

IN THE
Supreme Court of the United States
October Term 1943

CONRAD MARINO and GABRIEL VIGORITO,
Petitioners,
against
THE UNITED STATES OF AMERICA,
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

Opinion Below

The Court below rendered an opinion, a certified copy of which is annexed to the record submitted herewith. The opinion is not as yet officially reported.

Jurisdiction

The decision affirming the conviction was handed down on March 27, 1944.

The decision denying the petition for rehearing was handed down on May 23, 1944.

The jurisdiction of this Court is invoked under Section 240 (a) of the Criminal Code, as amended by the Act of February 13, 1925, Section 347(a), Title 28, U. S. C. See also Rule XI of the Rules for Criminal Appeals, promulgated by this Court on May 7, 1934.

Statement

The petitioners were convicted of the possession and transportation of distilled spirits in an unstamped container, under a statute which declares that its provisions shall not apply to spirits not intended for sale or for use in the manufacture or production of any article intended for sale.

The bare possession and transportation of alcohol were proved. There was no proof of any intention to sell it or to use it in the production of any article for sale. There was not even proof of knowledge on the part of petitioners that the alcohol was potable. There were no circumstances beyond the fact of possession from which such intent could be inferred. The small quantity of alcohol, the fact that the can and carton in which it was carried were used and dirty, that the can was only partly full, and that the alcohol contained rust particles, all pointed in the opposite direction.

Moreover, the petitioners immediately stated to the Government agents that it was radiator alcohol, to be used in a truck as an anti-freeze, and informed the agents when and where they had obtained it. They were actually truck operators, as the agents verified. There was not the least suggestion that they ever had dealt in alcohol.

At the trial, the petitioners produced the man from whom they got the alcohol. His testimony that he had found it in cleaning a garage basement, believed it to be radiator alcohol, and sold it to the defendants to be used as an anti-freeze, was consistent and contained nothing inherently incredible. The garage where he said he had found the alcohol was the one to which the petitioners had taken the Government agents, and the latter had investigated it.

Despite the investigation, and despite the fact that the agents testified that they had followed the petitioners' automobile prior to the seizure, they did not contradict the defense testimony in any particular.

The prosecution made no proof whatever in rebuttal. In the entire record, therefore, there was no actual proof that the petitioners' possession was for the purpose of sale or the production of any article for sale, nor of circumstances inconsistent with a permitted possession. There was not even any proof that the defendants knew that the alcohol was potable.

Statute Involved

Section 2803 (a), Title 26, U. S. C.:

"(a) Requirement—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits. The provisions of this section shall not apply to—

* * * * *

(6) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale; * * *."

Specification of Errors Assigned

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that the witness Feoto was an interested witness.
2. In holding as a matter of law that the credibility of an interested witness is in all circumstances a question of fact for the jury.
3. In holding that the testimony of the witness Feoto was not sufficient to rebut the presumption of a purpose to sell, and put the prosecution to actual proof of such purpose.

4. In holding as a matter of law that the petitioners had the burden of proof, as distinguished from a burden of coming forward with proof, of their affirmative defense.

5. In holding that the issue of the petitioners' guilt was properly submitted to the jury, when as a matter of law all of the facts and circumstances proved were consistent with a reasonable theory of innocence, and there was no substantial circumstance consistent only with the theory of their guilt.

6. In its refusal to correct error by the Trial Court in the conduct of the trial, amounting to a denial of due process.

7. In affirming the judgment of conviction in the District Court.

POINT I

The Circuit Court of Appeals erred in holding that the issue of petitioners' guilt was properly submitted to the jury.

This petition, and the record below, present the question whether a conviction can be sustained in the absence of any evidence whatever of a fact which is an essential element of the crime charged, and in the face of evidence to the contrary.

The exceptions of which subdivision (6) of Section 2803 (a), Title 26, U. S. C. is one, have been held to be matters of affirmative defense. This is because they are not an integral part of the sentence defining the offense. *Scher v. U. S.*, 305 U. S. 251.

Nevertheless, the statute does provide in plain terms that its provisions shall not apply to spirits not intended for sale or for use in the manufacture or production of any article intended for

The Circuit Court of Appeals has said that the burden was upon the petitioners to prove that their possession was not for the purpose of sale. This appears to be contrary to all accepted standards of proof in criminal cases. The burden of proof never shifts from the prosecution. *Coffin v. U. S.*, 156 U. S. 432, 461; *McAdams v. U. S.*, 74 F. (2d) 37, 40 (Eighth Circuit); *Ezzard v. U. S.*, 7 F. (2d) 808, 811 (Eighth Circuit).

The effect of the statute in question here is the same as though it forbade the possession or transportation in unstamped containers of spirits intended for sale, and then declared that possession of the spirits should be presumptive evidence that they were for the purpose of sale.

It is settled that such a presumption is only a rule of evidence, imposing upon the defendant the burden of producing evidence, and dispensing with proof of the fact presumed until it has been put in issue by some evidence to the contrary. *Tot v. U. S.*, 319 U. S. 463; *Morrison v. California*, 291 U. S. 82, 90, 91; *Casey v. U. S.*, 276 U. S. 413, 418; *Luria v. U. S.*, 231 U. S. 9, 25; *Del Vecchio v. Bowers*, 296 U. S. 280, 286. Upon the production of such proof, the presumption disappears, *N. Y. Life Ins. Co. v. Ross*, 92 U. S. 281, 284, 285; *Wiget v. Becker*, 84 F. (2d) 706, 708 (Eighth Circuit); *Von Crome v. Travelers' Ins. Co.*, 11 F. (2d) 350, 352 (Eighth Circuit); *Ezzard v. U. S.*, 7 F. (2d) 808, 811 (Eighth Circuit).

In the present case, the testimony of the witness Feoto required the presumption to be discarded, and put the prosecution to actual proof.

The facts proved by his testimony are inconsistent with guilt under the statute, as the Trial Judge perceived. But the Trial Judge erroneously treated the presumption as persisting, and submitted to the jury an issue upon which all of the proof was on one side. There was no evidence in the case from which the jury might infer such a purpose; and the submission to the jury was therefore error.

The Circuit Court of Appeals, however, held that even if the burden of proof was upon the prosecution, the sub-

mission was correct because the credibility of interested witnesses is always a question of fact for the jury. There can be no quarrel with this as a general rule; but it is not a universal one. *C. & O. Ry. Co. v. Martin*, 283 U. S. 209, 216-220; *Kalos v. U. S.*, 9 F. (2d) 268 (Eighth Circuit).

In the cases cited in the opinion below, it was applied to the testimony of defendants in their own behalf. Here the Circuit Court of Appeals has gone further. The only basis for describing Feoto as an interested witness was the fact that he is related by marriage to one of the petitioners. His testimony, putting himself in possession of the alcohol, subjected him to the same charge as that made against the petitioners. It was thus strongly against his interest.

The decision of the Circuit Court of Appeals in the present case is in direct conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *Ezzard v. U. S.*, supra, 7 F. (2d) 808. The petitioners urge that the court below is in error, and that a writ of certiorari should be granted so that the applicable principles may be stated by this Court, and the error corrected.

POINT II

The charge of the Trial Court, and the argument of the prosecutor to which the Court gave its sanction, deprived the petitioners of a fair trial. The Circuit Court of Appeals, in the proper application of principles announced by this Court, should have reversed the convictions upon that ground.

In the trial of this case, not one fact testified to by any Government witness was contradicted by any defense witness. Not one fact testified to by any defense witness was contradicted by any Government witness.

Nevertheless, the prosecutor persistently argued (R. 46, 47, 48) that there was an issue of veracity between the Government witnesses, who were agents of the Alcohol Tax

Unit, and the defendants. There was no basis in fact for the argument.

Counsel for the defendants made prompt objection, but the Trial Judge refused to correct the misstatement. With this implied sanction, the prosecutor continued his summation, and repeated the argument, upon assumed facts not in the record. Counsel again objected, and was again overruled by the Court. The Court refused to permit the stenographer to record the summation of the prosecutor.

The Circuit Court of Appeals, in its opinion, said that the argument of the prosecutor was justified on the evidence and was well within the scope of permissible comment. It is respectfully urged that the Court was in error.

"Civilized standards of procedure and evidence * * * are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

McNabb v. United States, 318 U. S. 332, 340.

Civilized standards require that prosecutors be scrupulous to avoid appeals to prejudice, and that trial courts be vigilant to correct such appeals, if made. When, with the sanction of the Court, a prosecutor is permitted to argue that an acquittal will brand government agents as liars, and that the issue for the jury is whether they believe the federal agents or the defendants, there cannot be doubt that the jury will return a verdict of guilty, even though, as here, there was not the slightest issue of relative integrity.

The Trial Judge, in his instructions, used the same language which has been objected to so vigorously when it was used by the prosecutor. He stated that there was a question of relative veracity; when exception was taken to the repetition of the phrase, the Court replied that there was a question of veracity between the statement made by the defendants at the time of arrest, and the testimony of the defendants' witness produced at the trial.

Apparently what he meant was that Feoto's testimony was suspect because it contradicted the unsworn statement of Vigorito in one detail, as to which the statement had also been contradicted by the Government agents.

But the Court's use of the prosecutor's language, in discussing the very statement which the prosecutor had said presented an issue of veracity between the defendants and the agents, inevitably left the impression with the jury that the Court had adopted and approved the prosecutor's argument.

The opinion of the Circuit Court of Appeals discussed at some length two clear misstatements of the evidence which occurred in the Trial Court's charge. One of these in particular was made the basis for a suggestion to the jury that the actions of the defendants were not those of innocent people. The Judges below differed on the question whether this "gave the incident a significantly different character from that which the testimony presented."

It was said, however, that these misstatements furnished no ground for reversal, for want of proper objection; and that it is doubtful whether the jury was misled.

This comment overlooks the real and substantial prejudice which resulted from the cumulative misrepresentation of the issue which the jury was to decide. The misstatements followed the improper argument of the prosecutor, and the Court's apparent approval of it, in the face of vigorous objection and exceptions to the Court's rulings. These objections surely directed the Court's attention to the error said now to be venial because not by itself made the subject of specific exception. They emphasized further the wholly false issue of character and veracity, and insured conviction of the defendants without proof, upon the wholly irrelevant basis of their prior convictions for other offenses.

The whole charge was an argument for conviction, and that is apparent even from a reading of its text. This Court should not overlook the added force of inflection and tonal emphasis.

CONCLUSION

The writ of certiorari should be granted so that this Court may say whether in a case such as this a conviction may be sustained in the absence of any proof of guilt, in the face of direct proof of innocence; whether a jury may discredit uncontradicted and unimpeached evidence of innocence merely because defendants have previously been convicted and have been compelled to disclose that record in order to meet the burden of adducing evidence to rebut a presumption.

This conviction needs review here unless the doctrine of proof of guilt beyond the reasonable doubt is to become an empty phrase in any case where the prosecution is aided by a statutory presumption of unlawful purpose.

Respectfully submitted,

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